IN THE

Supreme Court of the United States

October Term, 1945. No. 601

Elizabeth C. Lownsbury, Mrs. Evelyn H. Brantley, Richard C. Hassinger, William H. Hassinger, Mrs. Virginia H. Lange, Mrs. Leonora McCrossin, Robert Ingalls, Robert Ingalls, Jr., Ellen Gregg Ingalls, Ingalls Iron Works Company, Henry R. Howze, Alfred J. Snyder, and The First National Bank of Birmingham as: Agent for Kate Porter Lewis, Agent for Hugh Kaul, Agent for Virginia Kaul Greene, Trustee for Crawford T. Johnson, Jr., Trustee of Estate of Nathan L. Miller, Trustee of Estate of Charles B. Patrick, Trustee for Mrs. Virginia E. Hassinger, Trustee for Virginia H. Lange, Trustee for Mrs. Leonora H. McCrossin, Trustee for Mrs. Evelyn H. Brantley, Trustee for Mrs. Lucile H. Cabaniss, Trustee for William H. Hassinger, Trustee for Richard C. Hassinger, Trustee for Hugh Kaul, Trustee for Mrs. Roy Head Kaul, Trustee for Mrs. Virginia Kaul Greene, Executor of Estate of Lafayette R. Hanna and Executor of Estate of Crawford T. Johnson,

Petitioners,

v.

Securities and Exchange Commission

and

The Commonwealth and Southern Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States.

October Term, 1945.

No. .

ELIZABETH C. LOWNSBURY, MRS. EVELYN H. BRANTLEY, RICHARD C. HASSINGER, WILLIAM H. HASSINGER, MRS. VIRGINIA H. LANGE, MRS. LEONORA MCCROSSIN, ROBERT INGALLS, ROBERT INGALLS, JR., ELLEN GREGG INGALLS, INGALLS IRON WORKS COMPANY, HENRY R. HOWZE, ALFRED J. SNYDER, and THE FIRST NATIONAL BANK OF BIRMINGHAM as: Agent for Kate Porter Lewis, Agent for Hugh Kaul, Agent for Virginia Kaul Greene, Trustee for Crawford T. Johnson, Jr., Trustee of Estate of Nathan L. Miller, Trustee of Estate of Charles B. Patrick, Trustee for Mrs. Virginia E. Hassinger, Trustee for Virginia H. Lange, Trustee for Mrs. Leonora H. McCrossin, Trustee for Mrs. Evelyn H. Brantley, Trustee for Mrs. Lucile H. Cabaniss, Trustee for William H. Hassinger, Trustee for Richard C. Hassinger, Trustee for Hugh Kaul, Trustee for Mrs. Roy Head Kaul, Trustee for Mrs. Virginia Kaul Greene, Executor of Estate of Lafayette R. Hanna and Executor of Estate of Crawford T. Johnson,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION

and

THE COMMONWEALTH AND SOUTHERN CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, Elizabeth C. Lownsbury, Mrs. Evelyn H. Brantley, Richard C. Hassinger, William H. Hassinger, Mrs. Virginia H. Lange, Mrs. Leonora McCrossin, Robert Ingalls, Robert Ingalls, Jr., Ellen Gregg Ingalls, Ingalls Iron Works Company, Henry R. Howze, Alfred J. Snyder, and The First National Bank of Birmingham as: Agent for Kate Porter Lewis, Agent for Hugh Kaul, Agent for Virginia Kaul Greene, Trustee for Crawford T. Johnson, Jr., Trustee of Estate of Nathan L. Miller, Trustee of Estate of Charles B. Patrick, Trustee for Mrs. Virginia E. Hassinger, Trustee for Virginia H. Lange, Trustee for Mrs. Leonora H. McCrossin, Trustee for Mrs. Evelyn H. Brantley, Trustee for Mrs. Lucile H. Cabaniss, Trustee for William H. Hassinger, Trustee for Richard C. Hassinger, Trustee for Hugh Kaul, Trustee for Mrs. Roy Head Kaul, Trustee for Mrs. Virginia Kaul Greene, Executor of Estate of Lafayette R. Hanna and Executor of Estate of Crawford T. Johnson, pray that a writ of certiorari issue to the United States Circuit Court of Appeals, for the Third Circuit, to review the judgment of that Court, entered in the above entitled cause, on September 11, 1945, dismissing the Petition of Review and denying a stay of proceedings pending a review by that court.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 24 of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834-5; 15 U. S. C. Sec. 79x) and Section 240 (a) of the Judicial Code, as amended (28 U. S. C. Sec. 347 (a)).

The Opinions Below.

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 66-76) was rendered on September 11, 1945, and is not yet reported. On October 2, 1945, that Court handed down an order denying petitioner's application for rehearing (R. 86).

The opinion of the Securities and Exchange Commission (hereinafter referred to as the Commission), rendered May 31, 1945, the order of the Commission of June 30, 1945, and the order of the Commission of July 18, 1945, refusing a rehearing thereon, have not been officially reported. The opinion of the Commission is contained in its Holding Company Act Release No. 5825, the order of June 30, 1945, in its Release No. 5895 and the order of July 18, 1945, in its Release No. 5942.

Statute Involved.

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. Sec. 79, hereinafter referred to as the "Act"). The portions of that act which are involved are (1) Section 24, which is set forth in full as an appendix to the brief annexed hereto; the portion thereof directly involved reads as follows:

> "Sec. 24 (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia, by filing in such Court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *"

Also (2) Section 11, which is attached as Appendix B to the Petition for Review (R. 50-56). The subsections there-

of which are directly involved are a portion of subsection 11 (b) (2), which reads as follows:

> "Any order made under this subsection shall be subject to judicial review as provided in section 24."

And subsection 11 (e) which is set forth in full in Appendix B of the Petition for Review (R. 53-54).

Summary Statement.

The petitioners are individual stockholders, of Commonwealth and Southern Corporation, hereinafter referred to as Commonwealth, against which Corporation the orders of the Commission are directed. The petitioners own 328,597 shares of common stock and 179,387 option warrants, of Commonwealth (R. 2). All the petitioners were stockholders of Commonwealth prior to the beginning of the proceedings, and many of the petitioners obtained their securities by exchange for the securities of the underlying companies at the time of the formation of Commonwealth (1929-1930) (R. 5-6).

Commonwealth registered as a holding company under the provisions of the Public Utility Holding Company Act of 1935. It owns all the common stock of all its ten subsidiary operating companies, and no stock in any other public utility company. Its issued capital consists of 33,673,328 shares of common stock, without par value, representing an aggregate stated value of $168,366,640.29, or $5.00 per share (the value of Commonwealth's investments having been written down by $596,372,086.02 in 1933), and 1,482,000 shares of $6.00 cumulative preferred stock without par value, represented by an aggregate stated capital of $148,200,000. Commonwealth has approximately 175,000 stockholders of which 160,000 are holders of the common stock and these holders are literally scattered all over the world.

The Commission instituted integration proceedings under Section 11 (b) (1) of the Act and recapitalization pro-

ceedings under Section 11 (b) (2) of the Act, and on April 9, 1942, issued an order thereon against Commonwealth. Thereafter Commonwealth sought review in the Circuit Court of Appeals, Third Circuit, which Court affirmed the order of the Commission and denied the right of Commonwealth as a corporation to raise certain constitutional objections relative to the alteration of the rights of its stockholders on the basis that Commonwealth, as a corporation was not injured thereby, indicating such objections could only be raised by stockholders, when and if their rights were affected by a plan of recapitalization. (See: Commonwealth and Southern Corporation v. Securities and Exchange Commission, 134 Fed. 2nd 747.) The stockholders were sent no notice of the proceedings to this point (R. 8).

On May 8, 1943, the Commission sent notice to the stockholders of hearings, with respect to a plan filed by the Company pursuant to Section 11 (e) for compliance with Sections 11 (b) (1) and 11 (b) (2) of the Act, and consolidated the proceedings under all these Sections (R. 65).

The plan of recapitalization submitted by the management of Commonwealth briefly proposed to give the preferred stockholders 80% of the assets of Commonwealth in lieu of their present rights and to give the common stockholders only 20% of the assets in lieu of their present rights (R. 9-10). This plan gave approximately half as much to the common stockholders as a plan previously filed, upon which the Commission failed or refused to act (R. 8).

The petitioners sought to intervene as parties, but were permitted only limited participation in the hearings (R. 10), which extended from June 7, 1943, off and on, until March 27, 1944 (R. 11). During the course of the hearings there was a continuance of nearly six months, in which time a preferred stockholder's committee negotiated with officials and representatives of United Corporation, American Superpower Corporation, United Gas Improvement Company, and other corporate financial interests, and pro-

duced a plan which would give the common stockholders only 15%, instead of the proposed 20%, and give 85% to the preferred stockholders. The staff of the Commission, or members of the Commission, gave their opinion that the proposed plan would be acceptable to the Commission and they advised the officials of Commonwealth accordingly, with the result that Commonwealth withdrew the 80%-20% plan and adopted the 85%-15% plan. All the negotiations, conferences and communications between the parties, the staff of the Commission and with the officials of Commonwealth were ex-parte, in the absence of these petitioners and their counsel (R. 11-13). When hearings were resumed on March 23, 1944, after nearly six months adjournment counsel for the Commission and the examiner arbitrarily cut off cross-examination, sought to terminate the hearings and succeeded in bringing the hearings to an end, without permitting these petitioners a reasonable opportunity to cross-examine witnesses and prepare and introduce evidence (R. 13).

On June 30, 1945, the Commission handed down an order approving the 85%-15% plan, embodied therein by reference "Findings and Opinion" previously filed May 31, 1945 (R. 15), which findings were not supported by substantial evidence, dismissed exceptions filed by the petitioners, refused the petitioner's request to intervene as parties, and found the 85%-15% plan to be "fair and equitable." The order further provided for the issuance of securities in accordance with the plan, upon approval of a majority of stockholders at a meeting to be held to vote thereon (R. 16). The petitioners filed with the Commission a petition for rehearing (R. 16), and also a request for a stay of proceedings pending the exercise of the right of review provided by Section 24 of the Act (R. 16-17). These requests were refused by the Commission's order of July 18, 1945 (R. 17).

On August 8, 1945, within 60 days of the said orders, the petitioners, being persons aggrieved within the mean-

ing of the Act, filed a Petition for Review under Section 24 of the Act in the United States Circuit Court of Appeals, for the Third Circuit, under number 9015, seeking review of the Commission's order of June 30, 1945, and the order of July 18, 1945, refusing a rehearing and stay of proceedings. The Petition was brought on behalf of themselves and on behalf of all other holders of similar securities who might desire to join.

Briefly, the petition set forth: I. The orders are based upon arbitrary administration of the Act without a full and fair hearing and contra to due process of law (R. 18-22). II. The orders are based upon findings which are not supported by substantial evidence (R. 22-25). III. The orders approve a plan of recapitalization which is not fair and equitable to the common stockholders or to the holders of the option warrants (R. 26-28). IV. The orders are not authorized by the Act or, if authorized, are not within any power of Congress (R. 28-29). V. The orders directly impair the obligations of the contract of incorporation and deprive the petitioners of property rights without due process of law in violation of the Fifth Amendment (R. 29-32). VI. The orders construe powers of Congress in a manner as to deny rights retained by the people, or reserved to the States, in violation of the Ninth and Tenth Amendments to the Constitution (R. 32-33). VII. That economic and political conditions and taxation and fiscal policies of the government are so uncertain at the present time as to render the orders arbitrary. The petition requested a review of the orders of June 30, 1945, and July 18, 1945, that they be set aside and requested a stay of proceedings (R. 35).

The petitioners also filed with the Circuit Court a petition for stay of proceedings, pending a review on the merits (R. 58-62).

On August 13, 1945, the Commission filed a motion to dismiss the petitioner's petition for review on the ground that the plan of reorganization approved by the order of

June 30, 1945, was filed under subsection 11 (e) and was expressly conditioned upon stockholders approval and upon enforcement by a United States District Court, which conditions had not yet been met (R. 63-64). The petitioners opposed this motion at the hearing, held August 13, 1945, and contended that the order approving the plan was not conditional, but final, although the ultimate consummation and enforcement of the plan was conditional, and that the only Court with jurisdiction under the Act to review the order of the Commission and to grant the petitioners the relief provided in Section 24 of the Act is the Circuit Court of Appeals.

On September 11, 1944, the Circuit Court rendered its opinion granting the motion of the Commission to dismiss the petition for review and denying the request for a stay of proceedings (R. 66-76).

The Question Presented.

Are the petitioners, as stockholders in Commonwealth, entitled to a review in the Circuit Court of Appeals, under Section 24 of the Act, of orders of the Commission, issued as a result of consolidated proceedings under Sections 11 (b) (1), 11 (b) (2) and 11 (e) of the Act, approving a plan of reorganization for Commonwealth which alters their rights as stockholders, where the plan was filed under Section 11 (e) for compliance with Sections 11 (b) (1) and 11 (b) (2)?

Specification of Errors to Be Urged.

1. The Circuit Court of Appeals for the Third Circuit erred in refusing to review the orders of the Commission, as provided by Section 24 of the Public Utility Holding Company Act.

2. The Circuit Court of Appeals for the Third Circuit erred in refusing to grant a stay of proceedings, under Section 24 (b) of the Act, pending a review of the orders of the Commission.

Reasons Relied On For the Allowance of the Writ.

1. This case presents a federal question of great importance which has not been, but should be, settled by this court.

The petitioners are substantial holders of stock in Commonwealth. The orders of the Commission approve a plan for the reorganization of Commonwealth which the petitioners believe directly and adversely affects their property interests in Commonwealth. The question involved affects the interests of 175,000 stockholders of Commonwealth; 160,000 of which, are common stockholders, having similar interests to the petitioners. The financial interests of the petitioners, based upon the stated value of their stock on the books of the Company, is in excess of $1,500,000. The question involved likewise affects the interests of investors in holding companies other than Commonwealth, numbering in the millions, and effects property interests running into billions of dollars invested in the securities of these companies.

The petitioners believe Congress intended, by Section 24 of the Act, to grant to such investors a clear right of review of any order of the Commission which might affect their interests. The forum for such review is stated in Section 24 as the Circuit Court of the Circuit wherein the person resides. This forum, the petitioners believe, was designated to make a review convenient to the person or party aggrieved. In this case, the forum is also convenient to the Commission, since the Commission and several of the petitioners are all located in the Third Circuit.

The question, which seriously involves the administration of the Act, is whether the Commission or the Company, can by the device of filing a plan of reorganization under subsection 11 (e), for compliance with the provisions of Section 11 (b), circumvent a review on the merits, as clearly intended by Congress, namely, in the Circuit Court in the circuit wherein the person aggrieved resides, and thus by

so doing shift the forum to a District Court in another state, which Court is not only inconvenient, but has only limited authority in the matter. The jurisdiction of the District Court is only to "approve or disapprove" the plan. (See: In re Laclede Gas Light Co. (D. C. Mo. 1944, 57 F. Supp. 997). The Circuit Court has "exclusive jurisdiction to affirm, modify or set aside such order in whole or in part" (sec. 24 (a)).

In a prior proceeding, the Circuit Court, Third Circuit held that Commonwealth, as a corporation, did not have the right to raise numerous constitutional objections relative to the alteration of the property rights of its stockholders *inter se*. (See: The Commonwealth & Southern Corporation v. Securities and Exchange Commission, 134 F. 2d 747). Thus the burden of protecting their own property rights was placed squarely upon the stockholders themselves. Now that same Circuit Court has refused the petitioners, as stockholders, the right to a review of orders which refused them the right to intervene as parties and approved a plan which would deprive them of property rights. The Circuit Court has upheld the contentions of the Commission to the effect that the "device" of having the plan filed under subsection 11 (e) circumvents the right of review under Section 24. If this is the law, then the Commission will have succeeded in accomplishing a situation in which the corporation cannot defend the rights of its stockholders nor can the stockholders themselves have a complete review of proceedings which affect their property rights. Such a situation necessitates a determination of the proper procedure by which the Act is to be administered and the opportunity which is to be afforded stockholders to protect their property rights.

(2) The Circuit Court has decided a federal question in a way probably in conflict with applicable decisions of this court.

There has been no direct decision on the particular contention raised by the Commission in this case, but the peti-

tioners believe the Supreme Court intended to settle this and all similar questions relative to the right of all stockholders to a review by its opinion in the matters of American Power and Light Company v. Securities and Exchange Commission and Securities and Exchange Commission v. Okin, 65 S. Ct. 1254. Those cases decided that a stockholder was a person "aggrieved" within the meaning of Section 24 of the Act, hence was entitled to a review.

A question somewhat similar to the present question was presented in the matter of Okin v. Securities and Exchange Commission, 65 S. C. 1569, which was a petition for writ of certiorari to the Circuit Court for the Second Circuit. That case differed from the present case in that the Commission had already instituted proceedings in the District Court before the review was brought in the Circuit Court. In the present case the review was brought in the Circuit Court before any proceedings in the District Court. In the Okin case the Circuit Court dismissed the petition for review and the Supreme Court "vacated" the judgment of the Circuit Court. Nevertheless the Circuit Court for the Third Circuit, in the present case, has relied upon the judgment of the Circuit Court of the Second Circuit in the Okin case, as its authority for dismissing the petitioner's petition for review, despite the fact that judgment was "vacated".

There have been no decisions of this Court refusing a stockholder a right of review under Section 24, as the Circuit Court has done in the present case.

(3) The Circuit Court in refusing a review of orders of the commission has departed from the accepted and usual course of judicial proceedings.

Until the recent Okin cases (Securities and Exchange Commission v. Okin, and Okin v. Securities and Exchange Commission, supra), there appears to have been no question of the right of a stockholder, or any person aggrieved, to a review under section 24 of an order by the Commission.

This Court in deciding the case of Securities and Exchange Commission v. Okin, in both the majority opinion and the dissenting opinion, cited numerous cases in which the Circuit Courts reviewed the orders of the Commission, both at the instance of the Companies involved and their stockholders. The following is a partial list of the cases therein cited as authority for the right of review:

Lawless v. Securities and Exchange Commission, 1 Cir. 105 F. 2d 574; Todd v. Securities and Exchange Commission, 6 Cir. 137 F. 2d 475; Securities and Exchange Commission v. Chernery Corporation, 318 U. S. 80, 63 S. Ct. 454; New York Trust Company v. Securities and Exchange Commission, 2 Cir. 131 F. 2d 274; City National Bank and Trust Company v. Securities and Exchange Commission, 7 Cir. 134 F. 2d 65 and L. J. Maquis and Company v. Securities and Exchange Commission, 3 Cir. 134 2d 822.

In every one of the above cited cases the matter sought to be reviewed related to a plan filed under subsection 11 (e), which is the "device" the Commission now contends circumvents the right of review in the Circuit Court under Section 24. It should be noted that in L. J. Maquis & Company v. Securities and Exchange Commission, the Circuit Court which entertained jurisdiction on review was the Third Circuit, which in the present case has refused jurisdiction. In that case the Commission itself selected the forum by filing its transcript in the Third Circuit rather than in the Second Circuit.

As the administration of the Act has now reached the stage where the rights of stockholders are being affected, the Commission is apparently attempting to change the accepted procedure to circumvent the clear right of a complete review on the merits, under Section 24 in the Circuit wherein the party resides. If the Commission succeeds it will make it more difficult and inconvenient for the stockholder to protect his rights, and also prevent certain phases of the matter, which would be considered on complete review, from ever being determined.

Conclusion.

It is respectfully submitted that a writ of certiorari be granted.

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BRIEF IN SUPPORT OF PETITION.

I. The Public Utility Holding Company Act in Section 24 clearly grants the petitioners, as persons aggrieved, a right of review in the United States Circuit Court of Appeals from the orders of the Securities and Exchange Commission.

(a) Section 24 grants a complete right of review.

Section 24 states in explicit language the clear purpose of Congress to grant to any person aggrieved by an order of the Commission the absolute right of review in the United States Circuit Court of Appeals "wherein such person resides or has his principal place of business."

This section is very carefully drawn and specifies in clear detail:

(1) When the petition for review must be filed and the manner of its filing;

(2) The method of service of such petition;

(3) The duty of the Commission to certify and file a transcript of the record;

(4) The exclusive jurisdiction of the Circuit Court of Appeals to affirm, modify, or set aside such order, in whole or in part;

(5) The requirement that objections in the reviewing Court must have first been presented to the Commission unless there were reasonable grounds for failure to do so.

(6) Findings of the Commission as to the facts, if supported by substantial evidence, are made conclusive;

(7) Provision is made, upon proper showing, for an order by the Court to take additional evidence before the Commission;

(8) Provision is made for modification by the Commission of its original order on the basis of new or modified findings;

(9) The order of the reviewing Court is made final, subject to review by the Supreme Court upon certiorari or certification as provided in Sections 239 and 240 of the Judicial Code.

(10) Section 24 (b) relates to a stay of proceedings pending a review at the discretion of the Court.

These provisions of Section 24 set forth a comprehensive, coherent, expeditious and flexible system of review of all orders of the Commission. It is respectfully submitted that this jurisdiction, so plainly given by the Act, cannot be denied.

(b) Section 24 is generally applicable.

The entire contents of Section 24 pertains only to the procedure for review, thus it is obvious that this section is intended to establish the general procedure for reviewing all orders of the Commission, irrespective of the particular section under which some particular order might issue. The section contains no exception to its general provisions.

The general applicability of this section has recently been passed upon by the Supreme Court in the matters of American Power and Light Company v. Securities & Exchange Commission, and Securities & Exchange Commission v. Okin, 65 S. Ct. 1254. Mr. Justice Roberts in beginning his opinion expressed the intent to generally decide the question of jurisdiction in reviews of orders of the Securities & Exchange Commission under the Holding Company Act. He stated (page 1255):

> "We granted certiorari in these cases because of an apparent conflict in the decisions below concerning the application of Sec. 24 (a) of the Public Utility Holding Company Act, which provides that 'any per-

son or party aggrieved by an order issued by the Commission' under the Act may obtain a review of the order by the Circuit Court of Appeals of the circuit of his residence or principal place of business. The difference of view is as to the scope of the phrase 'person or party aggrieved.'"

As stated in that opinion, the right of review has always been accorded (page 1257):

"While the matter was not specifically moted, it would seem that, until the instant cases, both the Commission and the Courts have been of the view that persons situated as are the stockholders in these cases were given the statutory right to apply for review of a Commission order. In Circuit Court of Appeals, and in this court, stockholders have been heard upon the merits of orders made against corporations by the Securities and Exchange Commission."[7]

"7. Lawless v. Securities & Exchange Commission, 1 Cir., 105 F. 2d 574; Todd v. Securities and Exchange Commission, 6 Cir., 137 F. 2d 475; cf. Northwestern Electric Co. v. Federal Power Commission, 321 U. S. 119, 64 S. Ct. 451, 88 L. Ed. 596."

Even the dissenting opinion expressed the opinion that where the rights of stockholders, as such, are involved the right of review is clear (page 1259):

"The Commission's order does not deal with the rights of stockholders as such, in which case a stockholder clearly could appeal from the order. Securities and Exchange Commission v. Chenery Corp., 318 U. S. 80, 63 S. Ct. 454, 87 L. Ed. 626; Lawless v. Securities and Exchange Commission, 1 Cir., 105 F. 2d 574; New York Trust Company v. Securities and Exchange Commission, 2 Cir., 131 F. 2d 274; City National Bank & Trust Co. v. Securities and Exchange Commission, 7 Cir., 134 F. 2d 65. See also Otis & Co. v. Securities and Exchange Commission, 323 U. S. 624, 65 S. Ct. 483."

While the matter under consideration in the above case was, as there stated, whether or not a stockholder is a person aggrieved, the present case similarly is an attempt by the Securities and Exchange Commission to circumvent the stockholder's right to a review of its orders intended by Congress and expressed by the clear and natural meaning of the language of the same statute. The present case differs from the above case only that the "devise" for circumventing the statute is a different contention. Here the contention of the Commission is that, since the plan for recapitalization was filed under subsection 11 (e), the right of the stockholder to a right of review in the Circuit Court of Appeals was thereby eliminated.

(c) Review under Section 24 is the accepted procedure.

Among the cases referred to in the above case, as authority for the stockholder's right of review, there are at least four under which the plan in question had been filed under subsection 11 (e), namely, Securities and Exchange Commission v. Chenery Corp., 318 U. S. 80, 63 S. Ct. 454; New York Trust Company v. Securities and Exchange Commission (2 Cir.), 131 F. 2d 274; City National Bank & Trust Co. v. Securities and Exchange Commission (7 Cir.), 134 F. 2d 65; and Otis & Company v. Securities and Exchange Commission, 323 U. S. 624, 65 S. Ct. 483.

Also cited by the Supreme Court in that case, as authority for the stockholder's right of review in the Circuit Court of Appeals (note 8, page 1257) is the case of L. J. Maquis & Co. v. Securities and Exchange Commission (3 Cir.), 134 F. 2d 822, in which case the Circuit Court of Appeals, Third Circuit, to which this writ of certiorari is sought, itself reviewed a plan filed under subsection 11 (e) at the instance of the Commission. The Commission filed the transcript in the Third Circuit, rather than in proceedings pending in the Second Circuit, in order that it might select a convenient forum.

II. The orders sought to be reviewed are essentially under Section 11 (b) of the Act which specifically requires a review under Section 24.

(a) The proceedings were consolidated.

The orders sought to be reviewed were issued as a result of proceedings under Section 11 (b), both under Section 11 (b) (1), treating with integration, but more particularly with Section 11 (b) (2), dealing with simplification of the corporate structure which necessitates reorganization; while the plan for complying with Section 11 (b) was filed by the Company under subsection 11 (e), since it is the only section under which such a plan could have been filed.

The notice of the proceedings contained a specific provision consolidating the proceedings under 11 (b) (1), 11 (b) (2) and 11 (e).[1] This question also arose at the hearings and counsel for the Commission specifically pointed out that the proceedings under all the sections were consolidated (R. 65).

The Circuit Court, however, treats the orders as though they were issued only under subsection 11 (e), but both the order of June 30, 1945, and July 18, 1945, were issued under the caption of all three file numbers relating to the files of the proceedings under 11 (b) (1); 11 (b) (2); and 11 (e). Likewise the order itself makes references to numerous sections of the Act, including 11 (b) (1) and 11 (b) (2).

(b) Subsection 11 (e) is dependent upon Subsection 11 (b).

The contention of the Commission, to the effect that the orders were issued only under subsection 11 (e), does not support a denial of a review, since subsection 11 (e) is

1. Notice of Filing and Notice of and Order for Hearing on Plan Filed Pursuant to Section 11 (e) of the Act, and Order of Consolidation, May 8th, 1943, read in part as follows:

"It Is Ordered that the proceedings with respect to said Plan filed pursuant to Section 11 (e) of the Act and the pending consolidated proceedings under Sections 11 (b) (1) and 11 (b) (2) of the Act be, and they hereby are, consolidated, and that the scope of said consolidated proceedings shall include the issues hereinafter set forth."

completely dependent upon subsection 11 (b) according to its own terms. Plans under subsection 11 (e) must be "for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b)." And the Commission cannot approve such plan unless it "shall find such plan * * * necessary to effectuate the provisions of subsection (b)."

A reading of subsection 11 (e) in its entirety (R. 53-54) shows it is but one of a number of methods of carrying out the effective portions of Section 11, which are subsections 11 (b) (1) and (b) (2). Without reference to subsection 11 (b), there is no authority for that which is sought to be done by the plan, and no standard for the Commission's orders, which must find the plan "necessary to effectuate the provisions of subsection (b)."

(c) Subsection 11 (b) requires review under Section 24.

Subsection 11 (b) provides, inter alia, "Any order made under this subsection shall be subject to judicial review as provided in Section 24." The strong language "shall be subject" makes a review under Section 24 a condition precedent before orders pertaining to that section can become effective. How then can it be contended that a plan filed under subsection 11 (e) "effectuates the provisions of subsection b" if it fails to permit a review as provided for by that subsection?

III. The Circuit Court in dismissing the petition for review improperly construed Subsection 11 (e) of the Act.

(a) Subsection 11 (e) is consistent with Section 24.

In dismissing the petition for review the Circuit Court in its opinion stated the primary question involved as "whether this Court is the proper forum to test the Commission's orders pursuant to section 24 (a) of the Act, as petitioners allege, or whether the District Court is the proper forum pursuant to Section 11 (e) as the Commission alleges" (R. 67-68). By stating the question in that man-

ner the Circuit Court assumes an inconsistency between Section 24 and subsection 11 (e). Later the Court used the term "inconsistency" (R. 68).

There is, however, no inconsistency between these provisions; they merely relate to different things. Section 24 grants the general right of a person aggrieved to a review in the Circuit Court of any order under any section of the Act, without exception. If a review is sought, it must be sought within sixty days of the order. If, after sixty days have elapsed and no review is sought, a review of the order can not be had and the order is then ready for enforcement. Subsection 11 (e) provides the method for enforcement of the order, namely, in a District Court. In other words Section 24 is similar to all provisions, in the law generally, for appeal or review; while subsection 11 (e) is the method of procedure ordinarily followed for enforcement, when the time for review has elapsed or the review has been had and the order affirmed.

(b) The procedure in bankruptcy does not apply.

The Circuit Court indicated the procedure under the Public Utility Holding Company Act should be exactly the same as that for the reorganization of railroads under Section 77 of the Bankruptcy Act, 11 U. S. C. A. Sec. 205 (R. 69). In so construing the Act, the Court below overlooked the fundamental differences existing in the two situations. First, the statutes are entirely separate statutes. Since the intent under Section 24 is clear, there is no reason for placing any reliance on chance remarks which may have been expressed in the legislative history. Second: The railroads were insolvent and for this reason the proceedings initiated in the District Court. Here, however, Commonwealth is not insolvent, neither in bankruptcy, nor in default, and the proceedings were initiated in the Securities and Exchange Commission. Third: The orders of the Commission cannot be sustained as an exercise of the bankruptcy powers of Congress, Burco, Inc. v. Whitworth, 81 F.

2d 721, certiorari denied, Burco, Inc. v. Whitworth, 297 U. S. 724.

(c) The cases cited by the Circuit Court do not apply.

The opinion of the Court by Goodrich J. rested squarely upon the judgment of the Second Circuit in Okin v. Securities and Exchange Commission, 145 F. 2d 206, which judgment was vacated by this Court, 65 S. Ct. 1569. It should be noted that in that Okin case proceedings for enforcement had been commenced in the District Court before the petition for review was filed in the Circuit Court. In the present case, there have been no proceedings in the District Court, and at the time the petition for review was filed there were no proceedings elsewhere. The Circuit Court, Second Circuit, in the Okin case began its opinion by pointing out that proceedings had already begun in the District Court. We believe it was improper for the Commission to start enforcement proceedings, in the Okin case, in the District Court before the 60 days had elapsed within which to file a petition for review, but this contention is not essential to our position, since our petition for review was sought before any proceedings were brought elsewhere.

The Circuit Court in following the judgment of the Second Circuit avoided reference to the fact that this Court had vacated the judgment upon which it relied. We believe that in vacating the judgment of the Circuit Court, while remanding the matter to the Circuit Court for determination of a question not relevant to our question, this Court intended to convey to the Court below its disapproval of that judgment, particularly since this Court had just handed down its decision in the matter of Securities and Exchange Commission v. Okin, 65 S. Ct. 1254, in which it had broadly upheld the right of a stockholder to a review.

The concurring opinion of Biggs, J. relied largely upon the attempted parallel with the Bankruptcy Act; and the cases which were therein cited, namely, Gilbert v. Securities and Exchange Commission, 146 F. 2d 513, and Chicago &

N. W. Ry. Co. v. U. S., 52 F. Supp. 65. Both were bankruptcy matters in which the jurisdiction of the District Court had originally attached In the Gilbert case the matter of a plan of reorganization was merely referred to the Securities and Exchange Commission with the distinct provision that the matter be returned to the District Court as the Court of original jurisdiction.

(d) The construction adopted by the Circuit Court violates the rules for construction of statutes.

The interpretation of Section 24 and subsection 11 (e) placed upon them by the Court below, violates every fundamental rule for the construction of statutes.

(1) *Where the meaning is clear, a statute is not open to construction.* The meaning of Section 24 is clear. Certainly there can be no possible ambiguity as to which court is meant by the words "circuit court of appeals of the United States". Chief Justice Marshall stated, in the United States v. Fisher et al., 2 Cranch 358, on page 386, the fundamental principle for construction of statutes: "Where the intent is plain, nothing is left to construction".

The court should not have leaned toward a construction that there was an inconsistency between Section 24 and subsection 11 (e) when there was a clear, natural and consistent interpretation available as hereinbefore set forth.

(2) *The Courts will not imply an exception to a general provision in a statute.* The construction adopted by the court below requires that subsection 11 (e) be construed as an exception to the general provisions of Section 24. It is a fundamental principle of construction that where a statute uses general language, which is applicable to the subject matter, the Court will not construe an intent to exclude, since this would be an act of legislation on the part of the judiciary. The following excerpt from 50 Amer. Jurisprudence, page 452, par. 432, expresses the rule:

"Sec. 432. Implied Exceptions. There are some cases in which exceptions to the general provisions of a statute may be implied by the courts without being subject to the criticism of having entered the legislative field. This is true where the exceptions are necessary to give effect to the legislative intent. In this connection, it has been declared that where the whole context and the circumstances surrounding the adoption of an act show a legislative intention to make an exception to the general terms of the act, the exception will be recognized by the courts. However, an exception cannot be created by construction where none is necessary to effectuate the legislative intention, and courts should be extremely cautious in reading an exception into a statute. Ordinarily, exceptions must appear plainly from the express words or necessary intendment of the statute. Where the legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and it is a general rule of construction that the courts have no authority to create, and will not create, exceptions to the provisions of a statute not made by the act itself."

In Choteau v. Burnet, 283 U. S. 691, at page 696, the United States Supreme Court stated the rule as follows:

"The intent to exclude must be definitely expressed, where, as here, the general language of the act laying the tax is broad enough to include the subject-matter. Heiner v. Colonial Trust Co., 275 U. S. 232, 48 S. Ct. 65, 72 L. Ed. 256."

More recently, in American Power and Light v. Securities and Exchange Commission and Securities and Exchange Commission v. Okin (supra), the Supreme Court in interpreting Section 24 of the Act refused to interpret an exception to the phrase "any person aggrieved".

(3) *A section cannot be construed separately from the Act in its entirety.* The construction adopted would require subsection 11 (e) to be construed as though it were a separate statute, not a mere subsection under the Act as a whole. The right of review under Section 24, by its terms, is made generally applicable to "an order issued by the Commission under this title", thus including the Act in its entirety. It is a fundamental rule of construction that the Act must be construed as a whole, and that sections are not capable of separate constructions apart from the whole. The rule is stated in 50 Amer. Jurisprudence, page 133, par. 156, as follows:

> "Sec. 156. Division into Articles, Titles, Chapters, and Sections. A statute is regarded as passed as a whole and not in parts. The distribution of the provisions of a statute into articles, titles, chapters, and sections is merely a matter of convenience in reference search and examination."

(e) The construction would permit subsection 11 (e) to nullify Section 24.

The Court below frankly labeled the contentions of the Commission, as to subsection 11 (e), a "devise". We believe the Commission has chosen this "device" for the sole purpose of circumventing the stockholder's right of review on the merits of plans of reorganization of holding companies. There are approximately sixteen major holding companies and in practically every instance the plans for reorganization have been filed under subsection 11 (e). That is the only section under which the company may file a plan. If this "devise" is successful in this instance, millions of stockholders will have their property rights altered, diminished or totally eliminated, as are the warrants in the present case, by proceedings in which they may not become parties and which they may not completely review, as intended by Congress, under Section 24.

The broad powers of review, namely, to affirm, modify or set aside the order in whole or in part, have been held not to be available to the District Court in subsection 11 (e) proceedings. (In re Laclede Gas Light Co., 57 F. Supp. 997.) In the present case it is most important that the proceedings as a whole be reviewed.

IV. The orders of the Commission sought to be reviewed are final and not interlocutory.

The Court below improperly assumed that the orders sought to be reviewed were not reviewable because, as it stated, they were "conditional in nature". The conditions to which the Court below pointed were that the orders were conditioned, (1) upon approval by a vote of the corporation's stockholders, and (2) upon approval by a District Court.

As to the contention, that the orders were conditioned upon a stockholder's vote, it should be pointed out that the approval of the plan by the orders was not conditional. The Commission approved the plan, but the plan contained a condition for approval by "a majority at a meeting". One of our contentions was that this method of approval was not in keeping with the requirements of the Certificate of Incorporation; another contention was that the plan was unfair, hence should not be submitted to the stockholders until reviewed, particularly since the stamp of approval by the Commission would necessarily affect the stockholder's decision; also the Report which the Commission required to be sent out to the stockholders, under the provisions of subsection 11 (g) (2), contained statements from the findings, which were not supported by evidence, hence were erroneous and would be misleading to the stockholders. For these reasons a review was necessary before a vote should be taken. The so-called "conditional nature" of the order in this respect therefore made a review an absolute necessity.

As to the so-called condition that the plan had to be approved by a District Court, such a contention is an obvious attempt by the Commission to set up a "devise" to circumvent a review and shift the forum to the District Court. The so-called "approval by the District Court", to which this contention refers, is nothing more than ordinary enforcement proceedings. In other words the Commission contended, and the Court below sustained the contention, that the orders were conditional upon enforcement. Every law is conditioned upon enforcement and such a contention is an insult to the intelligence. Subsection 11 (b) makes as a condition to the enforcement of any order, under that section, that it "shall be subject to judicial review as provided in Section 24", which requires a review in the Circuit Court. The Commission cannot impose a condition that it be approved in a District Court so as to nullify the condition actually imposed by Congress.

Section 24 does not except from the right of review orders which are conditional. The only orders which should not be reviewed are orders which are actually interlocutory and this is because such an order will necessarily be later reviewed if and when they become final.

In Federal Power Commission v. Metropolitan Edison Company, et al., 304 U. S. 375, which the Commission cited as authority that the orders sought to be reviewed were interlocutory, there was an attempt to stay the hearings before they were held. In that case this Court properly decided the matter was interlocutory and was not the sort which brought it within the purview of the statute, but was a mere step in procedure. In the present case the hearings have been held and terminated; the matters complained of have been excepted to and all exceptions dismissed; the Commission has issued its final order; a petition for rehearing has been denied; and there is nothing left for the Commisison to do except as to certain other matters as to which it retained jurisdiction. If a petition for review had not been taken, the plan would have been put to a vote by the stockholders and if approved, enforced.

V. The petitioners are persons aggrieved, within the intent of the Act, therefore have a right to a review, and at this time.

The motion to dismiss the petition for review conceded the "legal standing of the petitioners to challenge the plan", but questioned the jurisdiction of the Circuit Court, and implied that the petitioners might not be aggrieved, since the orders, although final, are not yet operative. To be "aggrieved", within the meaning of the Act, does not necessitate the actual taking away of one's rights, which would be done by the consummation of the plan. It is sufficient if one's rights be "threatened".

In Columbia Broadcasting System v. United States, 316 U. S. 407, Chief Justice Stone pointed out, page 417, that it is proper that an order be reviewed in its "genesis". In that matter the order merely set up a rule and regulation which had not yet been enforced against the party seeking the review. On page 425 the Chief Justice stated as follows:

> "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow the results of which the regulations purport to control."

Parts of the orders, and the findings embodied in the orders, both threaten our rights and others constitute immediate injuries to our rights. The petition for review avers, and for the purposes of determining the right to review, these averments cannot be questioned, the following manners, inter alia, in which the petitioners are aggrieved by the orders:

The petitioners are aggrieved by the orders because: The orders are predicated upon proceedings not in accordance with due process; the orders are predicated upon hearings, which were not full and fair; the Commission arbitrarily refused to act upon a voluntary plan; the Commission denied the stockholders of Commonwealth the right to exercise their discretion in complying with Section 11; the Commission insisted upon Commonwealth reducing the allocation to the common stockholders, without evidence to support this demand; the Commission insisted upon a crude and wasteful form of plan resulting in small fractions; the orders require the submission to the stockholders of the plan in a manner both unfair and not in keeping with the requirements of the Certificate of Incorporation; the Commission has violated the right of equal protection of the law and the requirements of due process, by its administering the Act through special decrees; the Orders are predicated on "assumptions" of facts, which are not supported by any evidence; the Commission failed to provide due process and proper procedure by which the petitioners could defend their rights; the orders refused the petitioners the right to intervene as parties; the Commission prejudged the merits of the various plans and permitted members of its staff to negotiate, secretly and ex parte, for the withdrawing of another more favorable plan and for the amendment of that plan to give the common stockholders less; the hearings were conducted by the Examiner arbitrarily, with bias and exclusionary rulings, and characterized by haste, with a determined purpose to reach a predetermined end; the Commission arbitrarily refused to hear or see Counsel on appeal from such rulings; the orders improperly dismiss exceptions filed by the petitioners; no hearings were held upon the plan as finally amended; the orders are based upon findings not supported by substantial evidence; the orders approve a plan of recapitalization which is not fair and equitable; the orders are not authorized by the Act or, if authorized, are not within the powers of Congress. All of these

averments are to the effect that the orders immediately aggrieve the Petitioners. Although consummation of the Plan is deferred, the Petitioners are immediately aggrieved by the filing of a Report which the petitioners aver contains false, erroneous and misleading statements, and which Subsection 11 (g) (2) of the Act requires to be submitted to each stockholder in connection with any solicitation, either for or against the plan.

In addition to the immediate grievances, the Petition sets forth averments of threatened impairment of their contracts, deprivation of property rights and other violations of the Constitutional guarantees under the Bill of Rights.

VI. The court below should have stayed proceedings pending a review on the merits.

Subsection 24 (b) provides that the review shall not automatically act as a stay, but gives the Court discretion to stay proceedings. We contend a stay of proceedings pending a review was both proper and necessary.

The property rights of 175,000 stockholders of Commonwealth are in the process of being altered by a plan of reorganization, which we contend is unfair to 160,000 common stockholders and a large number of holders of option warrants. These stockholders are scattered throughout the world. Many are in the armed service. The petitioners themselves have substantial holdings, but the bill was brought also on behalf of others. Since the filing of the bill, we have been joined by numerous other stockholders whose holdings, together with petitioners, now amount to three-quarters of a million shares of common stock. Because of the sudden dismissal of the petition for review, it would have been useless to have filed a petition to join them. Because the common stockholders are so numerous and scattered, it is almost impossible to unite them for their defense and the cost of such an undertaking would be out of proportion to the holdings of any group of stockholders.

The only notice these stockholders have received has been the original hearings on May 8, 1943. The only information they have about the matter is the little which has been stated in the Company's annual reports and that which has been given out from time to time by releases to the press, most of which reports have given a distorted picture of the proceedings.

The stockholders are to be called upon to approve a plan and as their basis for approval are to have the Report of the Commission, which we contend bears no relation to the evidence, and the ultimate conclusion of the Commission that the Plan is "fair and equitable", when in fact it is not. If a vote be held under such circumstances before a review, the damage would be accomplished. The Commission knows this, and, for reasons which the petitioners cannot comprehend, are going to great lengths to circumvent a review on the merits and hasten enforcement of the plan before such a review can be had. Certainly the Government has no legitimate interest in hastily enforcing any particular plan for dividing property rights between preferred and common stockholders. If the Commission succeeds in its apparent purpose, a review thereafter will be an "idle ceremony", hence, a stay of proceedings pending a review on the merits is a necessity.

In Scripps-Howard Radio v. Federal Communication Commission, 316 U. S. 4, this Court stated, pages 9-10:

> "No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do. But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that, as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment

pending the outcome of an appeal. In re Claasen, 140 U. S. 200, 11 S. Ct. 735, 35 L. Ed. 409; In re McKenzie, 180 U. S. 536, 21 S. Ct. 468, 45 L. Ed. 657.

* * * * * *

If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made."

Conclusion.

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

ALFRED J. SNYDER,
WILLIAM H. BRANTLEY, JR.,
ELIZABETH C. LOWNSBURY,
Attorneys for the Petitioners.

November, 1945.

APPENDIX.

Section 24 of the Public Utility Holding Company Act.

COURT REVIEW OF ORDERS.

SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its find-

ings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(20)

IN THE

Supreme Court of the United States

October Term, 1945. No. 601.

Elizabeth C. Lownsbury, Mrs. Evelyn H. Brantley, Richard C. Hassinger, William H. Hassinger, Mrs. Virginia H. Lange, Mrs. Leonora McCrossin, Robert Ingalls, Robert Ingalls, Jr., Ellen Gregg Ingalls, Ingalls Iron Works Company, Henry R. Howze, Alfred J. Snyder, and The First National Bank of Birmingham as:—Agent for Kate Porter Lewis, Agent for Hugh Kaul, Agent for Virginia Kaul Greene, Trustee for Crawford T. Johnson, Jr., Trustee of Estate of Nathan L. Miller, Trustee of Estate of Charles B. Patrick, Trustee for Mrs. Virginia E. Hassinger, Trustee for Virginia H. Lange, Trustee for Mrs. Leonora H. McCrossin, Trustee for Mrs. Evelyn H. Brantley, Trustee for Mrs. Lucile H. Cabaniss, Trustee for William H. Hassinger, Trustee for Richard C. Hassinger, Trustee for Hugh Kaul, Trustee for Mrs. Roy Head Kaul, Trustee for Mrs. Virginia Kaul Greene, Executor of Estate of Lafayette R. Hanna and Executor of Estate of Crawford T. Johnson,

Petitioners,

v.

Securities and Exchange Commission

and

The Commonwealth and Southern Corporation,

Respondents.

MQTION TO DEFER.

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IN THE

Supreme Court of the United States.

October Term, 1945.

No. 601.

ELIZABETH C. LOWNSBURY, MRS. EVELYN H. BRANTLEY, RICHARD C. HASSINGER, WILLIAM H. HASSINGER, MRS. VIRGINIA H. LANGE, MRS. LEONORA McCROSSIN, ROBERT INGALLS, ROBERT INGALLS, JR., ELLEN GREGG INGALLS, INGALLS IRON WORKS COMPANY, HENRY R. HOWZE, ALFRED J. SNYDER, and THE FIRST NATIONAL BANK OF BIRMINGHAM as: Agent for Kate Porter Lewis, Agent for Hugh Kaul, Agent for Virginia Kaul Greene, Trustee for Crawford T. Johnson, Jr., Trustee of Estate of Nathan L. Miller, Trustee of Estate of Charles B. Patrick, Trustee for Mrs. Virginia E. Hassinger, Trustee for Virginia H. Lange, Trustee for Mrs. Leonora H. McCrossin, Trustee for Mrs. Evelyn H. Brantley, Trustee for Mrs. Lucile H. Cabaniss, Trustee for William H. Hassinger, Trustee for Richard C. Hassinger, Trustee for Hugh Kaul, Trustee for Mrs. Roy Head Kaul, Trustee for Mrs. Virginia Kaul Greene, Executor of Estate of Lafayette R. Hanna and Executor of Estate of Crawford T. Johnson,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION

and

THE COMMONWEALTH AND SOUTHERN CORPORATION,

Respondents.

MOTION TO DEFER AND REASONS THEREFOR.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, Elizabeth C. Lownsbury, Mrs. Evelyn H. Brantley, Richard C. Hassinger, William H. Hassinger, Mrs. Virginia H. Lange, Mrs. Leonora McCrossin, Robert Ingalls, Robert Ingalls, Jr., Ellen Gregg Ingalls, Ingalls Iron Works Company, Henry R. Howze, Alfred J. Snyder, and The First National Bank of Birmingham as: Agent for Kate Porter Lewis, Agent for Hugh Kaul, Agent for Virginia Kaul Greene, Trustee for Crawford T. Johnson, Jr., Trustee of Estate of Nathan L. Miller, Trustee of Estate of Charles B. Patrick, Trustee for Mrs. Virginia E. Hassinger, Trustee for Virginia H. Lange, Trustee for Mrs. Leonora H. McCrossin, Trustee for Mrs. Evelyn H. Brantley, Trustee for Mrs. Lucile H. Cabaniss, Trustee for William H. Hassinger, Trustee for Richard C. Hassinger, Trustee for Hugh Kaul, Trustee for Mrs. Roy Head Kaul, Trustee for Mrs. Virginia Kaul Greene, Executor of Estate of Lafayette R. Hanna and Executor of Estate of Crawford T. Johnson, respectfully move your Honorable Court to defer consideration of the Petition for Writ of Certiorari in the above entitled cause, and as reasons therefor state as follows:

1. On November 13, 1945 the Petitioners filed in this Court, a Petition for Writ of Certiorari to the United States Circuit Court of Appeals, for the Third Circuit, and Brief in support thereof. Said Petition relates to a judgment of the said Circuit Court, dated September 11, 1945, dismissing a Petition for Review of an Order of the Securities and Exchange Commission, dated June 30, 1945, made final by the denial of a Petition for Rehearing by Order of July 18, 1945; all of which related to the matter of the reorganization of The Commonwealth and Southern Corporation, so that it might comply with the provisions of the Public Util-

ity Holding Company Act of 1935 (49 Stat. 803; 15 U. S. C. Sec. 79).

2. Since the Court below handed down its judgment of September 11, 1945, the Securities and Exchange Commission on November 1, 1945 issued an Order which modified the Order of June 30, 1945. This Order, of November 1, 1945, required The Commonwealth and Southern Corporation, within fifteen days, to eliminate from its plan of reorganization a provision for a vote of approval by its stockholders.

3. On November 6, 1945, these Petitioners filed with the Securities and Exchange Commission a Petition for a Rehearing upon said Order of November 1, 1945; and the Commission by its Order of November 19, 1945 denied said Petition for Rehearing.

4. On November 9, 1945 the Board of Directors of The Commonwealth and Southern Corporation filed with the Securities and Exchange Commission a modification of the plan of reorganization in which it stated it "acquiesced in the elimination of the provision for stockholders' approval on the express condition, however, that the other modifications are also approved by the Commission." The other modifications referred to made basic changes in the plan of reorganization. The Commission has not yet acted upon this action of the Board of Directors of Commonwealth.

5. These recent proceedings, when the Commission has finally acted thereon, may have a bearing upon the judgment of the Circuit Court below since that judgment was predicated, at least in part, upon the position that the Order of the Commission of June 30, 1945, was conditional upon approval of the plan of reorganization by the stockholders of Commonwealth and Southern Corporation, and therefore was interlocutory (R. 68-69). Also, when the Commission has finally acted, orderly procedure would require that the Petition for Review be amended in keeping with the modifi-

cation of the Order sought to be reviewed; that the Court below be afforded an opportunity to reconsider its judgment in the light of the modification of the Order, and that the record to this Court be supplemented so that the entire matter may be heard upon the facts and pleadings as altered.

6. This request that the matter be deferred is not made for any purposes of delay, but solely that the matter be ultimately determined on the record as affected by the modification by the Commission of its Order of June 30, 1945, by the Order of November 1, 1945, and as it may be further affected by such action as the Commission may take upon the modifications filed by Commonwealth and Southern Corporation on November 9, 1945.

WHEREFORE, the Petitioners respectfully move that your Honorable Court defer consideration of their Petition for Writ of Certiorari to the United States Circuit Court of Appeals, for the Third Circuit, in the above entitled matter, until such a time as the Securities and Exchange Commission has finally acted in the matters aforesaid; until appropriate action can be taken in the Court below to bring such action upon the record and permit that Court to determine if the changed record affects its judgment; and to then supplement the record to this Court so that the matter may be determined upon the altered facts and pleadings.

Respectfully submitted,

ALFRED J. SNYDER,
WILLIAM H. BRANTLEY, JR.,
ELIZABETH C. LOWNSBURY,

By

ALFRED J. SNYDER.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 601

ELIZABETH C. LOWNSBURY, ET AL, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION AND THE COMMONWEALTH & SOUTHERN CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION TO PETITION AND IN OPPOSITION TO MOTION TO DEFER

OPINIONS BELOW

The majority opinion (R. 66) and concurring opinion (R. 70) in the Circuit Court of Appeals have not been reported. Similarly the opinions of the Commission have not yet been reported. The Commission's findings and opinion of May 31, 1945, have been published as Holding Company Act Release No. 5825. The Commission's

supplemental findings of June 30, 1945, and its order of the same date, have been published as Holding Company Act Release No. 5895. The Commission's order of July 18, 1945, denying petitions for rehearing, for leave to present further evidence, and for a stay, has been published as Holding Company Act Release No. 5942. An order of the Commission dated August 2, 1945, amending the findings and opinion of May 31, 1945, has been published as Holding Company Act Release No. 5966. Copies of all Holding Company Act releases referred to in this brief are being filed with the Clerk of the Court.

JURISDICTION

The Circuit Court of Appeals granted respondent's motion for dismissal of the petition for review on September 11, 1945 (R. 66–76). A petition for rehearing was denied October 2, 1945 (R. 87). In accordance with the practice of the court below no mandate of dismissal has been entered pending the disposition of the petition for a writ of certiorari. The petition for a writ of certiorari was filed November 13, 1945. The jurisdiction of this Court is invoked by petitioner under Section 24 (a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834–835, 15 U. S. C. § 79 x (a)), and Section 240 (a) of the Judicial Code, as amended (28 U. S. C. § 347 (a)).

STATUTE INVOLVED

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. § 79, hereinafter referred to as "the Act"). Sections 11 (d), 11 (e), 18 (f) and 24 (a) thereof (15 U. S. C. §§ 79 k (d), 79 k (e), 79 r (f) and 79 x (a)) are set forth in the Appendix, *infra*.

QUESTIONS PRESENTED

1. Where the Securities and Exchange Commission has made an order under Section 11 (e) of the Act approving a reorganization plan, which is not to be consummated unless and until approved and enforced by an appropriate district court, may an objecting stockholder challenge the plan by a petition to review the Commission's order in a circuit court of appeals, or is he limited to the district court enforcement proceedings and to an appeal from any adverse order therein?

2. Whether consideration of the petition for a writ of certiorari should be deferred.

STATEMENT

Section 11 (e) of the Act provides that a company subject to the Commission's jurisdiction may submit a voluntary plan for compliance with the integration and simplification features of the Act, and that thereafter the Commission, if it finds such plan to be fair and equitable and necessary to effectuate the provisions of Section 11 (b), may apply to a United States District Court, if the

company so requests, for an order enforcing the plan. Further provision is made for a court hearing on the fairness and appropriateness of the plan. Such a plan was filed with the Commission under Section 11 (e) by The Commonwealth & Southern Corporation (hereinafter referred to as "Commonwealth").[1] After a number of amendments had been made this plan was approved by the Commission in an order dated June 30, 1945.[2] This is the principal administrative order complained of by the petition for review, the other being an order of July 18, 1945, denying petitions for rehearing, for leave to present further evidence, and for a stay.[3]

[1] Previously, on August 9, 1942, the Commission had ordered Commonwealth, under Section 11 (b) (2), to change its capital structure to a single class of common stock in a manner not inconsistent with the Act and the rules of the Commission thereunder. The order was affirmed by the Circuit Court of Appeals for the Third Circuit in *The Commonwealth & Southern Corporation* v. *Securities and Exchange Commission*, 134 F. 2d 747. The reorganization plan here involved was proposed as a plan to achieve compliance with this earlier order.

[2] On May 31, 1945, the Commission entered its findings and opinion approving the plan on condition that certain amendments be filed. *The Commonwealth & Southern Corporation*, — S. E. C. —, Holding Company Act Release No. 5825. These amendments having been filed, they were approved by the Commission in a supplemental opinion which accompanied the order of June 30, 1945. *The Commonwealth & Southern Corporation*, — S. E. C. —, Holding Company Act Release No. 5895.

[3] *The Commonwealth & Southern Corporation*, Holding Company Act Release No. 5942.

In brief the plan provided as follows:

The presently outstanding securities of Commonwealth, consisting of preferred stock, common stock, and option warrants, were to be replaced by a new class of common stock. The option warrants were to be cancelled as having no value. The new shares of common stock, together with certain portfolio securities of Commonwealth, were to be distributed among the stockholders of Commonwealth in the proportion of 85% to the present preferred stockholders as a class and 15% to the present common stockholders as a class; in addition certain cash payments were to be made to the present preferred stockholders. The plan was conditioned upon receipt of the favorable vote, cast in person or by proxy at a special stockholders' meeting, of a majority of the shares of each class of stock voted at such meeting. The plan provided that, in the event of a favorable vote by the stockholders, Commonwealth would request the Commission to apply to an appropriate district court for approval and enforcement of the plan under Section 11 (e), and that it should not be effective unless approved by a district court.

In accordance with these specific provisions of the plan, the order of the Commission approving the plan provided "that this order shall not be operative to authorize any issuance, transfer or acquisition of securities or distribution of cash

contemplated by said plan, nor the consummation of said plan in any respect, until an appropriate District Court of the United States shall have entered an order enforcing said plan pursuant to an application duly made by the Commission for that purpose." It was also provided in the order that the Commission reserved jurisdiction, in the event of failure of the stockholders to approve the plan by the requisite vote, to take such further proceedings and enter such orders as might be necessary under applicable provisions of the Act.[4]

On August 8, 1945, petitioners filed their petition for review with the Circuit Court of Appeals for the Third Circuit and simultaneously therewith they requested a stay of all proceedings which might be taken to consummate the plan.

Petitioners are minority stockholders who own common stock and option warrants of Commonwealth. During the administrative proceeding they urged a greater participation for the common stock, and that is the principal burden of their petition for review.

The Commission opposed the stay and moved for dismissal of the petition for review on the ground that the Circuit Court of Appeals was not the appropriate forum for review of the Commission's order approving the plan, the proper forum being a United States district court

[4] *The Commonwealth & Southern Corporation*, Holding Company Act Release No. 5895, p. 6.

when and if proceedings might be instituted for enforcement of the plan. The opinion of the court below denying the stay and granting the motion for dismissal was filed on September 11, 1945 (R. 66).

A stockholders' vote has never been taken with respect to the plan, and an enforcement proceeding has not yet been instituted in a district court. The transcript of the administrative proceeding has not been filed with the Circuit Court of Appeals or with any other court.

Events subsequent to the decision below have materially changed the situation that existed when the petition for review was filed and dismissed by the court below, and as a result petitioners have filed a motion that consideration of the petition for a writ of certiorari be deferred pending further administrative developments. The subsequent events are these:

The Commission's order of June 30, 1945, approving the reorganization plan, had reserved jurisdiction in the Commission to entertain such further proceedings, to make such supplemental findings, and to take such further action as it might deem appropriate in connection with the plan and the consummation thereof.[5] In accordance with such reservation of jurisdiction, and subsequent to the decision below, a hearing was

[5] *The Commonwealth & Southern Corporation*, Holding Company Act Release No. 5895, p. 6.

held, on due notice, to determine whether the provision for a vote of the stockholders should be eliminated from the plan. On November 1, 1945, the Commission issued its findings and opinion in which it concluded that the voting provisions should be deleted because (1) a stockholders' vote was not necessary as a matter of law and (2) the inability of the various interested parties to agree on a voting procedure had resulted in excessive delay in the consummation of the plan and gave promise of endless delay in the future. Simultaneously therewith the Commission issued an order providing as follows:

> It is so ordered that the order of the Commission of June 30, 1945 be amended so as fo provide that the plan of recapitalization of The Commonwealth & Southern Corporation as amended June 14, 1945 be and it is hereby approved pursuant to Section 11 (e) of the Act, on condition however that said plan be amended by The Commonwealth & Southern Corporation within fifteen days of the date hereof so as to eliminate the said provision that a vote of stockholders be held on the said plan; the said order of June 30, 1945 to be, in all other respects, unchanged and unmodified.[6]

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[6] *The Commonwealth & Southern Corporation*, Holding Company Act Release No. 6177. The staff had asked that, in the alternative, the Commission itself so modify the plan, pursuant to powers vested in it by Section 11 (d), which

On November 13, 1945, Commonwealth submitted to the Commission a document entitled "Respondent's modifications of amended plan submitted under Section 11 (e) of the Act and application for approval."[7] In this document Commonwealth proposed that the plan be modified to delete the voting provision, but made this proposal contingent upon the acceptance by the Commission of certain other proposed modifications. We agree with petitioners that these additional modifications involve "basic changes in the plan of reorganization" (Motion to Defer, p. 3).

Under the plan approved by the Commission there would be an immediate distribution of certain securities on the basis of 85% to the preferred stockholders of Commonwealth and 15% to the common stockholders of Commonwealth. The additional modifications filed by Commonwealth provide in substance for a trust arrange-

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provides for district court enforcement of a Commission-sponsored plan.

On the same day, November 1, 1945, the Commission also issued an order dismissing "as moot" certain applications previously filed by Commonwealth and other interested parties (including petitioners) with respect to the solicitation of proxies in connection with the stockholders' vote contemplated by the original plan. *The Commonwealth & Southern Corporation*, Holding Company Act Release No. 6182.

For the discussion in the original opinion approving the stockholders' vote provision, see pp. 48–50 of Holding Company Act Release No. 5825.

[7] Copies of this document are also being filed with the Clerk.

ment which would give the common stockholders the privilege of waiting up to five years and benefiting from a possible rise in the market value of the securities by acquiring the shares otherwise allocated to the preferred stockholders, through payment of the fixed redemption price for which provision is made in the preferred stock contract. The Commission has not yet acted upon the modifications filed by Commonwealth.

Petitioners' motion urges this Court to defer action on the petition for a writ of certiorari, so that when the Commission has taken final action in the matter they may amend their petition for review in the court below, seek rehearing in that court, and then supplement the record in this Court to conform with the then existing state of facts.

The Commission opposes the granting of this motion and urges immediate disposition of the petition for a writ of certiorari, whether by denial of the writ, or by remand to the court below with instructions to dismiss the petition for review on the ground of mootness.

ARGUMENT

The decision below is squarely in accord with *Okin* v. *Securities and Exchange Commission,* 145 F. 2d 206 (C. C. A. 2), in which this Court denied certiorari (insofar as concerns the question here presented) on June 18, 1945, *Okin* v.

Securities and Exchange Commission, No. 1245, October Term, 1944. Indeed, the majority opinion below rests upon the opinion of the Circuit Court of Appeals for the Second Circuit in that case.[8] The decision below is also in accord with decisions by this Court and by the Circuit Court of Appeals for the Seventh Circuit, construing substantially similar statutory provisions. There is no conflict among the circuit courts of appeals. These circumstances, which are discussed more fully at pp. 12–18, *infra,* clearly warrant denial of the petition for a writ of certiorari.

The prematurity of the petition for review and the inappropriateness of petitioners' attempt to challenge the Commission's order in a circuit court of appeals rather than in a district court enforcement proceeding are emphasized by the developments since the decision of the court below. Modification of the Commission's order to deny approval of the plan unless amended in respect of the requirement of a vote, and the filing by Commonwealth of amendments which include substantial changes in the treatment of security holders in its original proposals, would seem to make it clear that, absent further action in the administrative proceeding, there is no order susceptible of enforcement or review in any court. Even had the petition for review originally pre-

[8] The concurring opinion represents a not too dissimilar approach to the same result.

sented a controversy within the jurisdiction of the circuit of appeals, these subsequent circumstances would, in our opinion, have rendered that controversy moot and made it appropriate to grant the petition for a writ of certiorari in order to remand the cause to the circuit court of appeals with instructions to dismiss the petition for review on grounds of mootness. *Montgomery Ward & Co.* v. *U. S.*, No. 408, October Term, 1945; *C. M. Patten & Co.* v. *U. S.*, 289 U. S. 705; *First Union Trust & Savings Bank* v. *Consumers Co.*, 290 U. S. 585; *Brownlow* v. *Schwartz*, 261 U. S. 216. We question the application of these cases to a petition for review properly dismissed below on the ground that it did not present a controversy cognizable in a circuit court of appeals. These subsequent events do, however, emphasize the correctness of the decision below and the propriety of denying certiorari.

1. The decision of the court below rests upon the circumstance that, before the Commission's order could either authorize or compel action, it was necessary that there be subsequent proceedings in a district court pursuant to Section 11 (e) in which that order would be subject to examination. It was therefore held that the order was not the kind of an order which Congress intended to be subject to the general provisions of Section 24 (a) of the Act permitting a direct review of Commission orders in a circuit court of appeals. That decision, of course, leaves open to objecting security holders the right to press their objec-

tions in the district court and, if those objections are not sustained, to appeal from an adverse order. Thus, the essential basis for the decision is that recourse to a circuit court of appeals at the then stage of the proceedings was premature and not in accordance with the statutory scheme. This ruling needs no extended examination, since the identical point was before this Court on petition for certiorari in *Okin* v. *Securities and Exchange Commission,* No. 1245, October Term, 1944.

Section 11 (e) provides that in the event the Commission approves a plan filed thereunder, the Commission, at the request of the company involved, shall apply to a district court for an order approving and enforcing the plan. The district court must make such an order if it finds the plan fair and equitable and appropriate to effectuate the provisions of Section 11.

Not all Section 11 (e) plans require district court enforcement. Where the consummation of a plan can be accomplished through a stockholders' vote or generally through applicable provisions of state law, the Commission in the past has not required that a provision for district court enforcement be incorporated into the plan. The Commission has taken the position that there may be review in a circuit court of appeals under Section 24 of the Act of orders approving plans which are not predicated upon district court enforcement and are thus immediately operative to license the transactions proposed. Such a case

was *Securities and Exchange Commission* v. *Chenery Corporation,* 318 U. S. 80, and so too were some of the other cases cited by petitioners (Pet. p. 12, 18).[9]

[9] Petitioners' citations are not always apt. The case of *Todd* v. *Securities and Exchange Commission*, 137 F. 2d 475 (C. C. A. 6) (Pet. p. 12), involved an appeal from a Section 11 (b) (2) order. The case of *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624 (Pet. p. 18) involved a Section 11 (e) plan which came up from a district court.

Petitioners apparently believe that the court below, in a ruling preliminary to the action reported as *Marquis & Co.* v. *Securities and Exchange Commission*, 134 F. 2d 822, took a position inconsistent with its decision in the instant case. Neither the majority judges nor the concurring judge in the court below thought this point worthy of discussion, although it was briefed before them. Actually the plan in that case did not originally provide for district court enforcement, and the proponents of the plan endeavored to consummate it by obtaining requisite votes under State law. Accordingly, the Commission did not challenge the jurisdiction of the Circuit Court of Appeals for the Third Circuit to entertain a petition for review filed therein by an aggrieved person, and the Commission certified the transcript of the record to that court. Subsequently, the companies involved decided that they could not execute the plan without judicial aid, and, at their request, the Commission instituted an enforcement proceeding in the District Court for the District of Delaware. The Commission then moved to stay the Circuit Court of Appeals proceeding pending action by the District Court. The motion was denied without opinion. At most the ruling was that once the exclusive jurisdiction of a circuit court of appeals attaches by virtue of the filing of the record, it cannot be displaced by the subsequent institution of an action in a District Court. The court below evidently did not regard its decision in the *Marquis* case as inconsistent with its holding in the instant case.

On the other hand, where a plan does contemplate district court enforcement, the statutory scheme renders inapplicable the general review provisions of Section 24 (a). For in such a case the function of the Commission and the function of the district court are "brigaded" and "intertwined" [10] to the extent that the order of the Commission is no more than the first step in a combined agency-court proceeding, and hence no more than an interlocutory step in such joint proceeding. Cf. *Federal Power Commission* v. *Metropolitan Edison Company,* 304 U. S. 375. This was essentially the ruling of the Circuit Court of Appeals for the Second Circuit in *Okin* v. *Securities and Exchange Commission,* 145 F. 2d 206, dealing with Section 11 (e),[11] and of the Circuit Court of Appeals for the Seventh Circuit in *Gilbert* v. *Securities and Exchange Commission,* 146 F. 2d 513, where the cognate provisions of Section 11 (f) of the Act were involved.

It was also the holding of this Court in *Chicago & North Western Railway Co.* v. *United States,* 320 U. S. 718, affirming *Chicago & North Western Railway Co.* v. *United States,* 52 F. Supp. 65 (N. D. Ill.), where the general provision in the Urgent Deficiencies Act [12] for review of I. C. C.

[10] *Palmer* v. *Massachusetts,* 308 U. S. 79, 87.

[11] The subsequent developments in this case are discussed at pp. 16–17, *infra.*

[12] Act of October 22, 1913, c. 32, 38 Stat. 208, 220, 28 U. S. C. § 47.

orders by a three-judge district court was declared inapplicable to an order of the I. C. C. approving a railroad reorganization plan under Section 77 of the Bankruptcy Act which was subject also to approval by a district court as provided in that section.[13]

Petitioners see significance in the fact that in the *Okin* case this Court "vacated" the decision of the Circuit Court of Appeals for the Second Circuit. However, the order was vacated only because of error on another point that had no relation to the question here presented. The Commission's order in the *Okin* case had not only approved a Section 11 (e) plan by a subsidiary of Electric Bond and Share Company but had also approved an application by Bond and Share, which was not being reorganized, for permission to use, in a specified manner, the proceeds it was to receive under the plan. Complaint was made by Okin with reference both to the plan and the use of the funds. Upon motion of the Commission the Circuit Court of Appeals for the Second Circuit dismissed the petition for review in its entirety. In its brief in opposition to certiorari the Commission conceded that the portion of the order authorizing the use of the proceeds by the parent company was unrelated to the Section 11 (e) plan and was properly reviewable in a circuit

[13] Further discussion of this point is contained in our brief in opposition to certiorari in the *Okin* case, No. 1245, October Term, 1944.

court of appeals under Section 24 (a)."[14] In its *per curiam* decision in the case, this Court stated:

> The petition for writ of certiorari is granted limited to the question whether that part of the Commission's order which licensed Electric Bond and Share Company's use of the proceeds derived from the plan of reorganization, can be reviewed only under Section 24 (a) of the Public Utility Holding Company Act. The judgment is vacated and the cause is remanded to the Circuit Court of Appeals for consideration of that question.[15]

Under the circumstances, it is clear that this Court's action in no wise challenged the ruling of the Circuit Court of Appeals for the Second Circuit on the issue of the reviewability of the Section 11 (e) plan.

The case at bar raises no such additional problem as was involved in the *Okin* case. The Commission orders appealed from are concerned only with Commonwealth's Section 11 (e) plan, and not with any collateral matters. The only respects in which the cases differ are (1) that in the *Okin* case an enforcement proceeding had already

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[14] The Commission did not, however, concede that Okin was a "person aggrieved" within the meaning of that section. This was before the decision of the Court in *Securities and Exchange Commission* v. *Okin*, No. 815, October Term, 1944. See p. 18, *infra*.

[15] The *per curiam* opinion of the Court also granted a petition for certiorari filed by the companies involved to correct a diminution of the record.

been instituted in a district court when the petition for review was filed in the Circuit Court of Appeals, and (2) that the reorganization plan in that case did not provide for a stockholders' vote prior to application to a district court for enforcement.[16] In the language of the court below, these factual differences present "no difference in legal question which we can see" (R. 69).

Petitioners seem to rely principally (Pet. 11, 12, 16, 22) upon another Okin case, *Securities and Exchange Commission* v. *Okin,* No. 815, October Term, 1944. The only question in that case was whether a stockholder is a "person aggrieved" within the meaning of Section 24 (a) by a licensing order directed to his corporation and not affecting the rights of stockholders *inter sese.* The instant case does involve the rights of shareholders *inter sese,* and the Commission has always conceded the petitioners' right to be heard in an appropriate court. The question here deals only with the court in which they shall exercise their unquestioned right to be heard.

2. It is the essence of the Commission's position that the preliminary and interlocutory character of its original order approving the plan rendered the general provisions of Section 24 (a) for review in a circuit court of appeals inapplicable. The

[16] This second point of difference has been eliminated by the subsequent decision of the Commission that the provision for a stockholders' vote should be deleted from the plan. See pp. 7–10, *supra.*

subsequent events emphasize the preliminary character of the Commission's order with respect to its impact on security holders such as petitioners. By its order of November 1, 1945, amending the earlier order approving the plan, the Commission conditioned its prior approval of the plan on the submission by Commonwealth of an amendment to the plan deleting the provision for a stockholders' vote. Commonwealth submitted an amendment deleting the provision for a vote but made the amendment contingent upon acceptance by the Commission of certain other amendments which import substantial changes into the plan (see pp. 9–10, *supra*). If Commonwealth's proposals are accepted, the plan constituting the basis for the petition for review will have been substantially changed. If Commonwealth's proposals are not accepted, there will then be no plan approved by the Commission and the prospect is one of continued administrative developments and the consideration of further plans either under Section 11 (e) or Section 11 (d). In either case the subsequent events put in bold relief the interlocutory character of the orders appealed from and the essential prematurity of the petition for review in a circuit court of appeals.

3. It is submitted that the motion to defer should be denied. The subsequent events relied upon by petitioners as the basis for deferring action only emphasize the preliminary nature of the Commission's order under review, the cor-

rectness of the decision of the court below not to entertain the petition for review, and the lack of substance in the petition for certiorari. Moreover, there is danger that the very pendency of the petition for certiorari, undisposed of by this Court, may cause some of the undesirable procedural consequences which would have followed from a holding that petitioners were entitled to have the court below rule on their objections to the plan. Thus, the thrust of petitioners' procedural contentions is directed to avoiding consideration of a plan in a district court until the cause has first gone through the appellate courts. If, contrary to the ruling of the court below, this were the appropriate statutory procedure applicable to the orders under review, it would nevertheless be true that affirmance of the Commission's order would not be conclusive of all issues which might arise in the district court enforcement proceeding,[17] and the procedures required by such a construction of the statute would be at best dilatory. In that event it would be vital to the orderly administration of the statute that there be no unusual time lag at any one of the many procedural stages involved. On the other hand, if, as we believe to be the case,

[17] It is possible, for example, that preferred stockholders or other persons not parties to the proceeding in the circuit court of appeals may raise issues in the district court which were not raised by the petitioners in the circuit court of appeals, and that another series of appellate proceedings would follow before final disposition of the plan.

the decision below is correct and the petition for a writ of certiorari without merit, it is submitted that the proceeding in this Court should not be permitted to remain pending, since even without a stay its very pendency might serve as an excuse for a delay of an appropriate enforcement proceeding in a district court.

CONCLUSION

For the reasons stated, the motion to defer should be denied. The petition for a writ of certiorari should be denied unless the Court should deem applicable the considerations which lead to the vacation of a decision of a court below which has subsequently become moot, in which event the petition should be granted and the cause remanded to the Circuit Court of Appeals with instructions to dismiss the petition for review on the ground of mootness.

Respectfully submitted.

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DECEMBER 1945.

APPENDIX

Section 11 (d) of the Public Utility Holding Company Act provides as follows:

> The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the

protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

Section 11 (e) of the Act provides as follows:

In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necesary for the purpose of carrying out the terms and pro-

visions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof wherever located; and the court shall have jurisdiction to appoint a trustee and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

Section 18 (f) of the Act provides as follows:

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this title.

Section 24 of the Act provides as follows:

(a) Any person or party aggrieved by an order issued by the Commission under

this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify

its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

U. S. GOVERNMENT PRINTING OFFICE: 1945

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IN THE

Supreme Court of the United States

October Term, 1945. No. 601.

Elizabeth C. Lownsbury, Mrs. Evelyn H. Brantley, Richard C. Hassinger, William H. Hassinger, Mrs. Virginia H. Lange, Mrs. Leonora McCrossin, Robert Ingalls, Robert Ingalls, Jr., Ellen Gregg Ingalls, Ingalls Iron Works Company, Henry R. Howze, Alfred J. Snyder, and The First National Bank of Birmingham as:—Agent for Kate Porter Lewis, Agent for Hugh Kaul, Agent for Virginia Kaul Greene, Trustee for Crawford T. Johnson, Jr., Trustee of Estate of Nathan L. Miller, Trustee of Estate of Charles B. Patrick, Trustee for Mrs. Virginia E. Hassinger, Trustee for Virginia H. Lange, Trustee for Mrs. Leonora H. McCrossin, Trustee for Mrs. Evelyn H. Brantley, Trustee for Mrs. Lucile H. Cabaniss, Trustee for William H. Hassinger, Trustee for Richard C. Hassinger, Trustee for Hugh Kaul, Trustee for Mrs. Roy Head Kaul, Trustee for Mrs. Virginia Kaul Greene, Executor of Estate of Lafayette R. Hanna and Executor of Estate of Crawford T. Johnson,

Petitioners,

v.

Securities and Exchange Commission

and

The Commonwealth and Southern Corporation,

Respondents.

Brief in Reply to the Commission's Brief in Opposition to Petition and Motion to Defer.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1945.

No. 601.

ELIZABETH C. LOWNSBURY, ET AL.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION AND THE COMMONWEALTH & SOUTHERN CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN REPLY TO THE COMMISSION'S BRIEF IN OPPOSITION TO PETITION AND MOTION TO DEFER.

ARGUMENT.

The Commission in its brief in Opposition to the Petition for Certiorari raises two contentions:

1. The Commission argues the orders sought to be reviewed are only interlocutory; hence the petition is "premature," having been taken too soon.

2. The Commission also argues that, since the orders sought to be reviewed have been modified, a review of those orders would be "moot"; hence too late.

We considered we have completely answered the first contention in our brief attached to the Petition for Certiorari; hence this brief will be directed to answering the contention of mootness and also answering the Commission's opposition to our Motion to Defer.

1. As to the Contention of "Mootness."

In our Motion to Defer we referred to certain developments in the proceedings which occurred since the decision of the Circuit Court denying a review. These facts are not in the record as it now stands before this Court. The purpose of the Motion to Defer was to afford an opportunity to bring these facts properly on the record. Counsel for the Commission oppose our Motion to Defer, yet see fit to argue from these facts. We must therefore refer to these facts as though they were on the record.

On November 1, 1945, the Commission handed down an order "modifying" its order of June 30, 1945. It should be noted this was a modification of the order, not a withdrawal. The modification ordered Commonwealth to remove a provision for a vote by the stockholders approving or disapproving the proposed plan of reorganization. All other provisions of the order of June 30th remain unaltered. The effect of the modifying order was to render the order of June 30, 1945, more objectionable than before. The Petitioners objected to the order of June 30th because it provided for approval of the plan of reorganization in a manner not in keeping with the requirement of the Certificate of Incorporation (R. 19). The modification removes even this inadequate provision for approval by the stockholders, so that the order now stands with all its objectionable features and in addition eliminates the fundamental right of a stockholder in a solvent corporation to voice his approval or disapproval of a reorganization of his company under which his contractual and property rights are to be altered. Certainly this modification by the Commission cannot be said to render our Petition moot. Its effect is to make it all the more imperative that our Petition be granted and that such arbitrary exercise of authority by a governmental agency be reviewed.

On November 9, 1945, the management of Commonwealth "acquiesced in the elimination of the provision for stockholders approval," but attached a condition that the

Commission approve certain basic changes in the plan of reorganization. The Commission has not acted upon this request, nor has it set a date for a hearing.

Certainly this action by the management of Commonwealth can not be said to affect our right to review. The order of June 30th still stands with none of its objectionable features removed and with the objectionable feature of the order of November 1st added and actually complied with by Commonwealth. Even were the Commission to approve the proposed modification of the plan it would remove only a few of the objections set forth in the Petition for Review and leave the order of June 30th standing, subject to most of the objections made in our Petition for Review. For example:

That these orders are based upon arbitrary administration of the Holding Company Act, without a full and fair hearing and contra to due process of law; (R. 18-22):

That these orders are based upon findings not supported by substantial evidence; (R. 22-25):

That these orders approve a plan of recapitalization which is not fair and equitable to the common stockholders and the holders of option warrants; (R. 26-28). It should be noted that the suggested modification of the plan still carries with it the unfair 85%-15% allocation and eliminates the option warrants without consideration:

That the orders are not authorized by the Act, or if authorized, are not within the power of Congress to regulate interstate commerce; (R. 28-29):

That the orders impair contractual obligations and deprive the Petitioners of property rights, without due process of law, in violation of the Fifth Amendment to the Constitution; (R. 29-32):

And that the orders violate the Ninth and Tenth Amendments; (R. 32-33).

Only a withdrawal of the order in its entirety could make our Petition moot. We wish we could agree with the Commission that the matter is moot, for that would

mean the order sought to be reviewed was now without any legal effect whatsoever. The Commission has the power to withdraw its order, but it has seen fit only to modify it, and then only to make it more objectionable. As the matter stands, the order of June 30th may become the basis of further proceedings and further action by the Commission. So long as this is possible the matter can not be said to be moot, since there remains a real controversy on questions vitally affecting property rights of these Petitioners.

The Petition for Certiorari presents a preliminary procedural question which has not yet been determined. If this Petition for Certiorari is denied, the Commission may disregard Commonwealth's modifications and proceed on its order of June 30, 1945, as modified, by immediate application to a District Court for enforcement. The effect of this would be to deny the Petitioners a review and nullify Section 24 of the Act in its entirety. We hesitate to think that an agency of our government would adopt such devious strategy to defeat the right of citizens, endeavoring to protect their property rights, but the possibility of such action remains, so long as the order of June 30, 1945, remains.

Had the Commission withdrawn its present order, so that the immediate controversy might have been considered moot, it would still be the duty of the Court to determine the question of our right to a review, since a similar order might and probably would be repeated. The Supreme Court in *Southern Pacific Terminal Co. v. Interstate Commerce Commission and E. H. Young* (219 U. S. 498; 31 S. Ct. 279), pointed out that the consideration of controversies involving questions of government authority should not be defeated, or a review evaded, where the order of a governmental agency is capable of repetition, or where the order may be the basis for further proceedings.

In that matter an order of the Interstate Commerce Commission required the appellants to desist from granting certain preferences for a period of two years. It was

over two years before the matter came to argument. Mr. Justice McKenna in his opinion reviewed both the facts in that case and those in several similar cases. His opinion relates so pertinently to the issue in the case at bar, that, for the convenience of the Court, that portion of the opinion follows in its entirety:

> "It will be observed that the order of the Commission required appellants to cease and desist from granting Young the alleged undue preference for a period of not less than two years from September 1, 1908 (subsequently extended to November 15). It is hence contended that the order of the Commission has expired, and that, the case having thereby become moot, the appeal should be dismissed.
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> This court has said a number of times that it will only decide actual controversies, and if, pending an appeal, something occurs, without any fault of the defendant, which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed. Jones v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611, and Richardson v. McChesney, decided November 28 of this term, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43. But in those cases the acts sought to be enjoined had been completely executed, and there was nothing that the judgment of the court, if the suits had been entertained, could have affected. The case at bar comes within the rule announced in United States v. Trans-Missouri Freight Asso., 166 U. S. 290, 308, 41 L. ed. 1007, 1016, 17 Sup. Ct. Rep. 540, and Boise City Irrig. & Land Co. v. Clark (C. C. App. 9th C.), 65 C. C. A. 399, 131 Fed. 415.
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> In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The question in-

volved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short-terms orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress.

In United States v. Trans-Missouri Freight Asso., supra, the object of the suit was to obtain the judgment of the court on the legality of an agreement between railroads, alleged to be in violation of the Sherman law. In the case at bar the object of the suit is to have declared illegal an order of the Interstate Commerce Commission. In that case there was an attempt to defeat the purposes of the suit by a voluntary dissolution of the agreement, and of the attempt the court said: 'The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal the court is asked not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future. . . . Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commercement of the action may terminate before judgment is obtained, or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the government has endeavored to procure by a judgment of the court under the provisions of the act of Congress above recited. The defendants cannot foreclose those rights, nor prevent the

assertion thereof by the government as a substantial trustee for the public under the act of Congress, by any such action has has been taken in this case.' And, referring to the agreement as one claimed by the government as illegal, it was further said: 'That question the government has the right to bring before the court and obtain its judgment thereof.' The interests there passed upon are no more of a public character than those involved in the order of the Interstate Commerce Commission in the case at bar, and there was no greater necessity for continuing a jurisdiction which had properly attached; and that the government is the respondent, not complainant, does not lessen or change the character of the interests involved in the controversy, or terminate its questions.

In Boise City Irrig. & Land Co. v. Clark, supra, the period for which a municipal ordinance fixed a water rate expired pending the litigation as to its legality, and it was contended that the case had become moot. The court replied: 'But the courts have entertained and decided such cases heretofore, partly because the rate, once fixed, continues in force until changed as provided by law, and partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter.'

The motion to dismiss is denied.''

This matter involves important questions of governmental authority affecting the property rights of 160,000 stockholders. The right of stockholders to a review in this case should be decided beyond any question. Counsel for the Commission have set upon a course of practice to defeat this right by procedural maneuvers calculated to wear out opposition to the Commission's orders. Confronted by the clear right of review granted by Congress under Section 24, a party aggrieved must of necessity seek

redress in the United States Circuit Court; otherwise he could be confronted by the contention that he has not been diligent and has lost his right of review. This is particularly true since the Act clearly provides that the Circuit Court only has the jurisdiction to review. It will be noticed the Commission, in attempting to steer the controversy into the District Court, does not state that the order will there be reviewed, but only that the "order would be subject to examination." If the question of the Petitioners' right of review is not decided at this time they will be forced, under the penalty of losing their right of review, to proceed in the same manner again and again, and each time be confronted with a repetition of the same contentions now put forth by Counsel for the Commission. Certainly citizens have the right to a clarification of the procedure by which they may protect their property rights from infringement by a government agency.

2. As to the Motion to Defer.

In our Motion to Defer we set forth various facts which had occurred since the decision of the Circuit Court and the reasons why it was necessary to defer consideration of the matter until these facts could properly be brought upon the record. We made no attempt to argue the motion by a brief, since we considered the Respondents would agree this should be done in the interest of orderly procedure. The opposition to the motion by the Commission came as a surprise especially since they have seen fit to rely upon the changed facts to support a contention in opposition to our Petition for Certiorari.

The purpose of the Motion to Defer was to bring the modification of the order, and the compliance by Commonwealth with that order, upon the record so that the matter might be considered by the Court on all the existing facts. It is submitted that until these facts are properly brought upon the record the Court is not in position to consider

them, even in the manner in which the Commission seeks to use them; namely, as a basis for its contention of "mootness."

Another reason for the Motion to Defer was the changed position now adopted by the management. Commonwealth now agrees, as we have constantly urged, that the plan should be changed. The alterations proposed by the management are not entirely acceptable to our Petitioners, but they afford a basis from which a compliance with the requirements of the Holding Company Act may be worked out on a more equitable basis and to the satisfaction of these Petitioners. Should this much desired result be attained it would then be unnecessary for this Court to pass upon either this Petition for Certiorari or the more important matters presented by our Petition for Review. It would seem the Commission also should desire such a result and lend its offices to its attainment, rather than oppose a deferment.

As the matter now stands, either the matter should be deferred, to permit the additional facts to be brought upon the record, and the Petition for Certiorari then considered; or the Petition for Certiorari should be granted on the record as it now stands, with the matter ultimately remanded to the Circuit Court for the Third Circuit, with leave to amend the Petition for Review to bring the additional facts upon the record, and for a review thereon.

Respectfully submitted,

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